

OWEN, ME, AND THE SIEGE OF CHICAGO

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1. Owen and Me at Chicago

Here is something you might not have known about Owen Fiss, or about me, either: when I was in law school, Owen was my Property Law teacher. Here is something else that I am quite sure you don't know about Owen: he was not just a teacher of high property theory. He also taught about the nuts and bolts of property. He taught my property class about mortgages, tax treatment of depreciation, landlords' cash flow. Cash flow! I am still not quite sure I understand what cash flow is, but Owen did, or it certainly seemed to me that he did.

It is possible, though, that the only reason that he knew (or appeared to know) those hard-nosed business terms is because at the time, he was teaching at the University of Chicago. That was where I started as a first-year student. Owen left the University of Chicago that very year for Yale, which, I believe, is the place where he met practically everyone else in SELA. But I found out who he was at Chicago. He did not have the faintest idea who I was (it was a very large class, and I only once heard that stentorian voice peal out, "Ms. Rose?" – I am sure it was from a seating chart). But invisible though I was to Owen, I thought Owen was wonderful, the very best teacher I had in my first year, and as it would turn out upon reflection, in my whole life.

But that is another story. Let me go back to Chicago: I have read the speech that Owen gave at the Yale Law School graduation in 2011, and in that speech he described his

move from the University of Chicago to Yale. He made it sound like a move from a rock-strewn ice field to a lush, grassy plain, full of delicious fodder for thought and reflection and theory. As for those of us whom he left back in the ice field, well, we very much noticed his departure too. We regretted it, a lot. I was bereft when Owen left, and I know for a fact that other students were too—for example, my then boyfriend, who was a couple of years younger than me but a year ahead of me in law school. He had just taken Owen's class on Injunctions.¹ He wasn't even a very conscientious student, for the most part, but he knew a good thing when he saw it. So yes, Chicago did feel a little rocky, and rockier still when Owen left.

On the other hand, I stayed on as a student at Chicago, and I have always had a very deep admiration for it, even though Owen did not think it was the place for him. I do think it was the Chicago law school that made him talk about mortgages and cash flows, and I must say, my appreciation for this wonderful teacher was much enhanced by the way he could mix the most serious theoretical and civil rights concerns with these very tough considerations of cold cash. Those financial details were much newer to me at the time than any abstract theory was, and they put the theory to the test. In fact, I would bet that it was the University of Chicago that made Owen teach Property Law in the first place, because property mattered at the University of Chicago, and also because in those days, it was the kind of law school where everyone had to teach everything.

The University of Chicago at that time, and I think now too, was an academic institution that reflected the city: hard, brash, funny, smart, fast, relentless. And intense:

¹ Owen says that the University of Chicago Law School made him call the class "Equity," or maybe "Equitable Remedies," but I can attest that the students all called it what he wanted to teach, namely "Injunctions."

as a student, I loved the fact that my professors dressed in any old clothes, drove cars that were beat-up pieces of junk, lived in semi-slum apartments—and that none of that stuff mattered. The only thing that mattered was the life of the mind. Their minds, our minds, anybody's minds-- as long as your ideas were good, you could be a part of this aristocracy of the mind. Students could come to hear workshop papers, and even participate in the discussion, and staying on as a Chicago student, I did just that, although I was not very bold about it. Those experiences did not exactly make up for Owen's departure, but at one or two of those workshops, I watched some academic confrontations that were to become the stuff of legend in later years.

So Owen left all that for the lush green fields of Yale, where he founded the Legal Theory Workshop, and where he became one of the central figures in an astonishing intellectual community that seemed to grow more scintillating and more expansive with every passing year. Back at hard-scrabble Chicago, I recall hearing some sniping about the sipping of claret and port among the Yalies. But fine wine or no fine wine, the Yale Law School was to become the envy of all the others, a magnet for the brightest students in the country and increasingly in the world—once again due in large part to Owen's remarkable outreach to Latin America, and I should say, to Bo's as well.

Lushness and green-ness were obviously good-- good enough to tempt me too to join later on, in a way that Chicago did not tempt me, at least not by the time I had been teaching for a few years. Owen's choice was my choice too, as it turned out. But I think what was an easy choice for Owen left me with some guilt pangs, some sense of the role of a place like Chicago, where the grass may be sparser and rougher, but no one has to worry about getting fat. Not, of course, that I think my Yale colleagues really have gotten fat. That again

is in part due to Owen, who has constantly held up an example of intensity, and made everyone else work hard to emulate it. But I wonder sometimes whether he didn't bring some of that intensity from Chicago.

2. State vs private, or Brown vs. Shelley.

Owen's views on the role and function of courts are well known, and well-expounded by Victor's excellent discussion at this conference. To recapitulate that discussion very briefly, Owen sees the judge not simply an arbiter who settles disputes between parties, but rather as a representative of the state, whose task it is to decide cases in the light of public values. She does not choose the cases she must hear; she must listen carefully to all sides and arguments; she must deliberate; and she must give reasons for her decision – reasons that are open to public criticism. These processes legitimate her role as one who states and effectuates public values, and her object is not satisfaction or even peace between the parties, but rather justice.

Owen developed his position on the judge's role over a number of articles, but he particularly sharpened his views in response to what he called the Chicago Style.² The embodiment of the Chicago Style was an essay by Professor and then Judge Frank Easterbrook. Easterbrook very much embraced the mere dispute-resolution conception of the judging, and in the course of doing so equated justice with the maximization of preference satisfaction—very much a Chicago-style argument. Owen's rebuttal was that Easterbrook was flat wrong, and that the Easterbrook conception was not at all what judges are supposed to be doing, that is, they should be enunciating and setting in motion the

² Owen M. Fiss, Justice Chicago Style, 1987 U. Chi. Legal Forum 1.

effectuation of public values. That role was most strikingly seen in the constitutional cases that set off the great “structural reforms” of school desegregation in the American south—followed by voting rights actions, prison reform and others, all hugely significant cases that upset entrenched bureaucratic processes, and that were hardly compatible with the model of a small-bore dispute resolution between two conflicting parties. Indeed, Owen’s model judge was one of the iconic figures of the civil rights era in the United States: Frank Johnson, a federal judge in Montgomery, Alabama, who instituted exceedingly difficult systematic desegregation reforms with patience, strict decorum, reasoned deliberation about constitutional principle, and – not the least of the matter—great personal courage.³

Just as Frank Johnson is the iconic judge for Owen’s position on the courts as enunciators of public and especially constitutional values, so is *Brown v. Board of Education*⁴ the iconic case for it—the 1954 Supreme Court decision that segregation of public schools is a violation of Fourteenth Amendment’s requirement that public bodies and actors provide equal protection of the laws to all within their jurisdictions. Brown itself initiated the grand drama of school desegregation in the south, but beyond that, it “set loose”⁵ a series of challenges to racial segregation in all kinds of other domains: public parks and other public institutions, elections, public accommodations like hotels and restaurants, and finally housing. Desegregation throughout these realms led to great resistance and sometimes violent confrontations through the 1950s, 1960s and 1970s. Legislation too was important to the effectuation of desegregation. Civil rights laws of the era reached deeply into business activities and privately-owned property, and that fact helped to hollow out a

³ Owen M. Fiss, *The History of an Idea*, 78 *Fordham L. Rev.* 1273-1274 (2009-2010)

⁴ 347 U.S. 483 (1954)

⁵ Owen M. Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after Brown v. Board of Education*, 41 *U. Chi. L. Rev.* 742 (1973-1974)

legal issue that had bedeviled many earlier desegregation efforts: the so-called “state action” doctrine, according to which the Fourteenth Amendment reached only unequal treatment by public officials.⁶ Brown, then, and the great institutional reform cases that followed Brown, gave the weight of example to Owen’s view of the courts and their proper function.

While Owen was developing and elaborating his view of judging, I found myself sliding into legal academic life, somewhat to my own surprise and I am sure even more to the surprise of my law school teachers. I also found myself growing especially interested in property law, probably due to Owen’s wonderfully penetrating property class in my first year. But I am sure that I was also influenced by the rest of my University of Chicago education. Property law is in some ways a quintessentially Chicago-style topic, all about investing and planning, buying and selling. The institution of property is widely supposed to incentivize effort and careful management by the prospect of wealth, while punishing sloth and carelessness with the whip of impoverishment. Property law in that sense is quintessentially private, all about the kind of moneygrubbing that that the Chicago School supposedly celebrates, and not much about the public and especially constitutional values that animate Owen’s conception of judging.

On the other hand, there is a public quality to property. Unlike contract, which chiefly involves the parties to the contract itself, property poses the owner as one who is recognized as such by everyone; property is “good against the world,” in the common phrase, the ultimate public. Moreover, the pursuit of wealth, so much incentivized by property, has an ultimate public goal, if not a particularly elevated one – that is to say, not just the wealth of individuals, but the wealth of nations. Finally, as my Yale colleague Bob Ellickson is

⁶ Id., at 743-748.

fond of saying, nobody fights revolutions over torts or contracts or even civil procedure, but they do fight revolutions over property.

People fight revolutions over constitutions too, which does link property quite strongly to constitutional and public values. Short of revolution, however, the most common constitutional law issue about property falls under the rubric of “takings” law, not only in the United States but in many other countries as well, like South Africa. The major issue in “takings” cases is whether some governmental action affects someone’s property in a way that requires compensation to the property owner. Like most property law teachers in the United States, I found myself writing a few things about takings questions, even though they are generally impossibly vague. But my major encounter with the constitutional law of property came from another subject altogether, a subject that is always close at hand in Owen’s work: the constitutional legitimacy (or illegitimacy) of restrictions based on race. In my case, those racial restrictions concerned the ownership of private property.

The iconic case of Brown vs. Board of Supervisors tends to lead researchers and commentators to questions about the constitutional status of governmental actors and institutions, especially with regard to segregation. But my iconic case was not Brown. It was Shelley v. Kraemer, a Supreme Court case that was decided six years before Brown.⁷ In Shelley, the issue was not segregation imposed by governmental actors, but rather segregation based on private decisions about private property. More specifically, Shelley concerned the constitutional status of racially restrictive covenants on property. These property restrictions were usually instituted by the original developers of what were then new subdivisions, and they were designed to “run with the land,” so that every current and

⁷ 334 U.S.1 (1948)

future owner within the subdivision would be obligated to keep the property from falling into the hands of racial minorities. The minorities in question were primarily African Americans, but sometimes the racial covenants also aimed to keep out Asians or persons of Latin American origin, or occasionally “Mongolians,” “Assyrians,” “Semites,” and what were called “Hindoos.”

With respect to racially restrictive covenants, the “state action” question was still very much alive at the time of the Shelley case. Moreover, unlike the legal developments that followed Brown, Shelley did not succeed in sweeping the state action question away—far from it; the case only complicated the question. Shelley ruled that judicial enforcement of these ostensibly private property arrangements was indeed state action under the Fourteenth Amendment, but it was not very clear why. For decades prior to Shelley, every important state supreme court decision had ruled that racially restrictive covenants in subdivisions and neighborhoods were not state action. This was by contrast to racial zoning, instituted by local governments to separate the races in residential communities; racial zoning had been ruled by the U.S. Supreme Court to be unconstitutional state action in 1917.

⁸ But in the years that followed Buchanan v. Warely, the 1917 case about zoning, court after court stated that racially restrictive covenants in subdivisions and neighborhoods could be distinguished from governmental zoning; racial covenants were merely private action, and as such they were, as one real estate lawyer put it, “constitution proof.” Even the United States Supreme Court ostensibly agreed, ruling in a 1926 case that racial restrictions were private and hence did not present a constitutional issue for the Fourteenth Amendment jurisdiction of the Court—there was no “state action.”⁹

⁸ Buchanan v. Warley, 245 U.S. 60 (1917)

⁹ Corrigan v. Buckley, 271 U.S. 323 (1926).

On the issue of racially restrictive covenants up to the 1948 Shelley decision, judges and courts did not behave with the careful deliberation and reasoning about public values that Owen so cherishes in the judicial process. Far from it. In the 1920s, 1930s, and 1940s, the cases about racial covenants were full of casual insults to minorities, and easy assumptions that racial integration of neighborhoods would diminish the property values of white owners. On occasion, judges simply fulminated. One example came from the state supreme court of Maryland, where the court's opinion fumed that the U.S. Supreme Court's 1917 ruling against racial zoning was incomprehensible. "[A]ll agree," said the Maryland Court "[that] something ought to be done" about the influx of African Americans into the cities, implying that since racial zoning was no longer possible, it was only to be expected that white homeowners would try to protect their property values by private exclusionary restrictions.¹⁰

A more general pattern in the racially restrictive covenant cases, however, was that courts gave only the most perfunctory or formulaic attention to questions of public values. A notable example of this kind of formalism came from the California Supreme Court in 1919, not on the issue of "state action" but rather on the question whether racial restrictions on property were an unreasonable restraint on alienation. The California court first ruled that yes, prohibitions on the sale of property to African Americans was indeed an unreasonable restraint on alienation; but the court then turned around and ruled that racial restrictions on the "use" of property were not restraints on alienation at all.¹¹ The result of this formalism was that African Americans could own restricted residential property—but

¹⁰ Meade v. Dennistone, 196 A. 330, 332-333 (1938),

¹¹ Los Angeles Investment Co v. Gary, 186 P. 596 (Cal. 1919).

they could not live in the houses that they owned. Needless to say, few people wanted to buy homes that they could not occupy.

Interestingly enough, Chicago was a hotbed of activism about racially restrictive covenants, both for and against. One lawyer who agreed that racial restrictions were “constitution proof” was a very prominent Chicago real estate attorney who was a central figure in promoting racial covenants. Notable on the other side was the Chicago Defender, an African American newspaper with wide national circulation—including among its readers many southern black people, thanks to the African American railway porters on the lines that ran between Chicago and the southern states. The Defender kept up a steady journalistic drumbeat of criticism of racial restrictions, while the chief legal opposition to racially restrictive covenants came from the National Association of Colored People (NAACP); the Chicago branch was among the most active on this subject, even though the major covenant litigation from Chicago was eventually sidetracked in favor of cases from other states.

The NAACP’s main legal argument was that racially restrictive covenants were a violation of the Fourteenth Amendment’s prohibition on unequal treatment of the races. But the NAACP had no real answer to the “state action” question, given that racial covenants originated in private actions rather than governmental ones. The United States Supreme Court did not have much of an answer either. The Shelley case was decided by a mere six of the nine Justices, after three justices ingloriously recused themselves, presumably because all of them lived in houses that had racially restrictive covenants. The six who remained simply asserted that judicial enforcement of racially restrictive covenants was unconstitutional “state action,” without saying how this judicial enforcement differed from

the routine enforcement of an ordinary contract or a grant of an injunction against trespass.

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Moreover, unlike the prodigiously productive Brown case six years later, the Shelley case went nowhere. Courts could not enforce racially restrictive covenants after the case, but the ruling did not make these restrictions illegal, and many real estate professionals continued to write them into deeds after 1948. As one widely-used real estate treatise said in the mid-1960s, even though the courts would not enforce racial restrictions, the restrictions could still be used—presumably to send a message to minorities that they were not wanted in a white community. When Congress finally made these restrictions flatly illegal, it did so without any particular reference to the Shelley case.¹³

And so, the conflict over ostensibly private racial property restrictions did not produce any ringing judicial opinions, and no Judge Frank Johnsons, and only a very few judicial ruminations about public values, mainly from judges in very low-level municipal courts. My thought about the subject is this: public values were at stake, but they were not so much about constitutional law, especially the fourteenth amendment's equal protection clause, as they were about property law. There is a longstanding tradition in the common law of nuisance that a person cannot be a nuisance simply by reason of who he or she is. A legal nuisance has to involve some noxious activity, and a complaint cannot be based on mere personal characteristics. At the very time that racial restrictions became prevalent in American real estate, even judges in the deep south abided by this understanding.¹⁴ Racially restrictive covenants departed from this public value embedded in property law, in effect

¹² For some of these issues, see Richard R. W. Brooks and Carol M. Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law and Social Norms* 140-145, 171-172 (2013).

¹³ *Id.*; see also 177-186.

¹⁴ Brooks and Rose, *Saving the Neighborhood*, *supra*, 31-34.

allowing minority members to be treated as nuisances because of their very persons. By the same token, American property law has traditionally been wary of arbitrary restrictions on the free passage of ownership from one person to another, a tradition that is embodied in the disfavor to what are called “restraints on alienation.” Racial restrictions violated that tradition too. These arguments surfaced in the long legal battles against racially restrictive covenants, but they were not much noticed.¹⁵

And so, in working on this topic of racially restrictive covenants, I thought that this very Chicago-like private law subject—the buying and selling of real estate—did after all raise public values. It seemed to me that Owen was right: private law engages public values too. But then one has to ask the question: why did those values not get heard more in the decades-long legal struggle against racially restrictive covenants?

Here is one answer: it was because the fourteenth amendment constitutional law arguments drowned them out. “Equal protection” was an easy rubric to use, but in fact, the fourteenth amendment discussion was pretty sterile. The property law discussion, on the other hand, could have been very fruitful. A property law discussion could have even veered back into constitutional terrain, but towards the thirteenth amendment, which banished slavery for all actors, and which had no state action predicate. Slaves were not just the property of someone else. They themselves were not supposed to own property, because the ownership of property offers a way out of slavery. Thus a property law discussion could well have treated racially restrictive covenants as an ongoing badge of slavery into the 1940s, long after the Civil War amendments supposedly banned slavery. And incidentally, a property law discussion at that time could have had some uses in the

¹⁵ Id., 56-62.

context of the Cold War, very much on the minds of U.S. political leaders in 1948, when Shelley was decided. The State Department urged a ruling against racially restrictive covenants on the very practical ground that legal segregation – private or not – made the United States look bad in the eyes of the world. A focus on the liberationist aspects of property ownership might have been helpful in that practical diplomatic context too, a nice defense of capitalism in the international struggle with authoritarian socialism.¹⁶

What Shelley and the story of racially restrictive covenants taught me, among other things, was that our judicial institutions can squander opportunities to explain and effectuate public values. That was what happened in Shelley, and I think that one reason was that the exalted constitutional idea of equal protection drowned out what might have been a much more relevant explication of public values –the public values embodied in subjects seemingly so prosaic as property and contract.

But this brings me to my last Chicago-based topic: the role of the market in public values.

3. The forum (judicial, that is) vs the market

In many of Owen's writings, he contrasts the courts to the market, describing the market as the locus for the satisfaction of preferences—or I guess I should say, the mere satisfaction of preferences. That is what people do in buying and selling from one another: I trade my X for your Y, because I want your Y more than my X, and you want my X more than your Y. By trade, we are both better off. It is all very simple, and not very high-minded. Legislatures do not generally fare much better in Owen's work. Although they do

¹⁶ Id., 138-139, 176.

occasionally exercise a more value-oriented role, one of their chief tasks is to correct what are called “market failures”—such matters as unwanted effects of trades on third parties—so that a wider set of preferences can be satisfied. But of course, when Frank Easterbrook, the quintessential Chicago School thinker, argued that the proper role not only of the market but also of the courts is preference satisfaction, we know what Owen did: he took up the combat mode, laying siege to the Chicago School.

In arguing that the courts’ role is not a quest for preference maximization but rather for justice, Owen has sometimes drawn a distinction among the courts themselves. Constitutional decisionmaking is the iconic location for courts’ search for public values, as those values are represented in the Constitution itself. But aside from that, Owen has emphasized the actions of the courts in their “equity” jurisprudence rather than their “law” mode, reflecting the ancient distinction between the common law courts on the one hand, which followed legal rules and the letter of the law, and the courts of equity on the other hand, whose task was to do justice in cases in which the standard legal rules were inadequate. Equity jurisprudence is much more demanding for judges, because they have to weigh considerations of fairness and justice even beyond the legal rules, and because they may use an array of equitable remedies that may involve them for long periods of time in managing the multiple issues in a given case. That has especially been true of the courts that have taken up the great challenges of institutional reform, like desegregation and prison reform.

As Owen wrote in his Foreword to the Harvard Law Review’s issue on the Supreme Court’s 1978 Term, over the decades after the great civil rights cases, there was something of a backlash against courts’ involvement in institutional reform.¹⁷ One might see this as a

¹⁷ Owen M. Fiss, Foreword: The Supreme Court 1978 Term: The Forms of Justice 93 Harv. L. Rev. 1, 4-5 (1979).

variant on the argument that common law rules are more appropriate for the courts than equity jurisprudence. Here too, Frank Easterbrook and the Chicago School might be counted as a part of the backlash; just a few years after Owen's Foreword, Easterbrook argued in another Harvard Foreword that the *ex ante* approach of fixed rules is a more appropriate understanding of law than the *ex post* consideration of fairness.¹⁸ Easterbrook's article showed once again that in championing of the courts' involvement in complex equity cases, and in emphasizing their concern for justice, Owen was engaged in an ongoing siege of Chicago.

But there is somewhat more to this picture. Let me return to Owen's class in property law, many years ago back at the University of Chicago itself. One of the matters that Owen discussed in class at some length was another financial topic of which I knew nothing at the time: mortgage lending in the purchase of real estate. The old-fashioned, indeed medieval version of lending was based on what came to be called the "title theory": the lender rather than the borrower held title to a major piece of property, and would only restore title to the borrower after the loan was completely repaid. If the borrower failed to make payment, the lender kept the property permanently, along with any past payments that the borrower had already made. This gave great security to lenders, but could work great hardship on borrowers, especially those who had already repaid substantial sums.

By the seventeenth and eighteenth centuries, English and then American courts of equity were giving a break to worthy but hard-pressed borrowers, protecting them from forfeiture by giving them extra time to pay, and, in the case where they really could not pay, restoring to them any sums beyond those that they actually owed to the lenders. But as I

¹⁸ Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4 (1984).

learned in Owen's class, that equitable relief from the letter of the law, the so-called "lien theory" of mortgages, was not altogether stable. At least by the later 19th century, lenders had re-invented a new version of the title theory, called the "instalment land contract," in which the lender once again held title to a property until the borrower had paid off the entire debt—again putting borrowers at risk of losing all. It was a risk that many lower-income borrowers accepted, however, because they did not have other options. This story once again had a connection with the city of Chicago: a few years before I sat in Owen's class, some lower-income families in Chicago neighborhoods, mostly African American, had challenged instalment land contracts on equitable and civil rights grounds. Owen had us read a part of this Contract Buyers' League case, where we once again saw the title theory of mortgage lending at work, and where we saw the equitable and civil rights challenges that this lending practice generated.¹⁹ Owen also assigned some material about a series of cases in California, in which the California courts at first accepted instalment land contracts but then came to impose the equitable "lien" theory on them, restoring to the borrower any sums beyond the actual debt. But today in Arizona, I see advertising signs in less well-to-do neighborhoods that proclaim "Rent to Own!" – yet another resurgence of the title theory over the equitable lien theory of mortgages. Today's rent-to-own lenders will hold title until the buyers—conveniently characterized as "renters"—have paid the entire purchase price, and will lose all past payments if they fall short.

Back in Owen's property class years ago, I was mesmerized by this oscillating pattern, this back-and-forth between the title theory and the equitable lien theory of lending—law versus equity, strict ex ante rules versus ex post fairness. I kept the lesson in mind for

¹⁹ Contract Buyers' League v. F. & F. Investment, 300 F. Supp. 210 (N.D. Ill. 1969).

a good fifteen years, long after I had begun teaching property myself, and after I had realized that there were similar see-saw patterns in some other areas of property law. I wrote an article about them in the later 1980s, called “Crystals and Mud in Property Law,”²⁰ and it even became modestly famous; but it was really based on Owen’s idea. I sent him a reprint and told him so.

But given my Chicago roots, I found that I could not just leave it at that. Owen was laying siege to the Chicago-school imperialism of preferences, sharply distinguishing the judge’s quest for justice from the market’s focus on preference satisfaction. But I found myself wondering whether the market itself might have some equitable or public-minded aspects. Clearly some thinkers in the past had thought so. I found myself growing interested in the writers of the eighteenth century Scottish Enlightenment, writers like David Hume, James Steuart and Adam Smith. I was assisted in this by the wonderful work of the great Princeton economic historian, Albert Hirschman, who revived interest in the eighteenth century idea that commerce was “gentle” and that market transactions worked to soften and polish manners.²¹ I have spent a great deal of my own career pursuing this kind of idea, in an effort to rescue the market itself from the extremes of the pure preference-satisfaction model. Indeed, if market transactions were no more than pure preference satisfaction, we would never have markets at all: we would never get beyond the parties’ efforts to maximize their preferences by grabbing what the other party has. Why trade X for Y, when you can grab Y and keep X too? But grabbing is not a market transaction. Market transactions

²⁰ 40 Stan. L. Rev. 577 (1988)

²¹ Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* 58-63 (1977).

entail trust and cooperation in jointly beneficial enterprises -- not just self-interest but what nineteenth century American thinkers called “self-interest rightly understood.”

None of this sounds very exalted, but at least a sense of fair dealing is a normal part of market activity. Indeed, I have tried to present property and trade as forming a kind of school for rights-consciousness as well as democratic decisionmaking. To engage in trade, one must recognize the rights of others and one must pay attention to their wants; one must also bracket off divisive disagreements on matters not pertinent to the furtherance of mutual interests, instead one must focus on the matters where cooperation is possible. Beyond that, market relationships introduce us to people we would not know otherwise and encourage us to learn more about those others; in many cases market dealings are the opening steps in formation of lasting associations and sometimes close friendships.

Those practices have close analogs in the decisionmaking processes of democratic self-government. As I have argued in earlier SELA meetings, we do not have many institutions that educate us in the practices needed for democratic decisionmaking, and it behooves us to pay attention to this important one that we do have. Are there abuses of market transactions? Yes, of course there are, but cheating and advantage-taking are not what make markets work; quite the contrary, they undermine markets rather than define them. Indeed, these abuses no more define market transactions than judicial abuses like corruption and carelessness define judging.

With that, let me conclude where I started. I think Owen carries more of Chicago with him than appears on the surface. Chicago has been on his mind, if only to besiege that formidable fortress, the Chicago School of law and economics. On the other hand, as something of a product of that school, I have been trying to lift the siege by reconfiguring

the fortress itself, in the hope that I can open a few doors and windows and let down the bridge across the moat, and perhaps convince some people that the besiegers and the besieged actually have a good deal in common. But my efforts began with what I learned from Owen, who talked not only about justice but also about cash flow and mortgages those many years ago, in the heart of the fortress, in his class in Property Law at the University of Chicago.

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